Supreme Court, U.S.
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No. 97-140

IN THE
Supreme Court of the United States
October Term, 1996

KATHERINE HINE,
Petitioner,

v

STATE OF OKLAHOMA EX REL.
OKLAHOMA BAR ASSOCIATION,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF OKLAHOMA

BRIEF OF *AMICUS CURIAE*
ARCH, CHILD ABUSE FORENSIC INSTITUTE, ECLIPSE, HEAR MY VOICE, JUSTICE FOR CHILDREN, THE LINKUP,*
(*IDENTITY OF AMICI CURIAE CONTINUED ON NEXT PAGE)

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(IDENTITY OF AMICI CURIAE, CONTINUED)
NATIONAL ALLIANCE FOR FAMILY COURT JUSTICE,
NATIONAL COMMITTEE FOR THE RIGHTS OF THE CHILD,
NATIONAL TASK FORCE FOR CHILDREN'S
CONSTITUTIONAL RIGHTS, INC., DR. HAL PIPINSKY, ROSS
COUNTY NETWORK FOR THE PREVENTION OF CHILD
SEXUAL ABUSE, SAVE, SNAP,
IN SUPPORT OF PETITIONER

QUESTIONS PRESENTED FOR REVIEW

1. Whether, without this Court's acceptance of certiorari, the precedential value of the Oklahoma decision below refusing to protect petitioner Hine's speech under the First Amendment, leaves serious questions of public importance as to the circumstances under which lawyer speech can ever reliably enjoy constitutional protection?

2. To what extent should this Court consider the hostile political climate in which petitioner's speech was subjected to punishment, and the probability that Oklahoma's Rule 8.4(d) was applied to her speech in a discriminatory manner, in assessing the compelling public importance of this Court setting clear constitutional standards for such regulations that continue to stifle public discourse about controversial or unpopular topics?

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IDENTITY AND INTERESTS OF AMICI CURIAE

1. **Alliance for the Rights of Children** ("ARCH"), [formerly, Friends of Elizabeth Morgan] is a Virginia based 501(c)(3) organization committed to protecting children from abuse. Its president is Glennie Rohelier. ARCH's interest in the petition is in protecting the rights of child advocates to speak out on behalf of children at risk.

2. **The Child Abuse Forensic Institute** ("CAFI"), based in California, provides advocacy, referral, therapy, investigative, and training services for protective parents and legal professionals seeking expert direction in child abuse cases. CAFI's executive director is attorney Seth Goldstein. CAFI's interest in the litigation before this Court is its fear that the precedential effect of such decisions will cause professional child advocates to begin self-censorship.

3. **ECLIPSE (Emancipating Children from Legal Injustice, Pornography & Sexual Exploitation)**, based in South Carolina, is a national nonprofit corporation providing multi-disciplinary professional assistance in child abuse cases. Its president is Robert L. Millard. ECLIPSE's interest in this case is due to children's sole voice within the system being the one provided by advocates.

4. **Hear My Voice** ("HMV") is a national children's rights organization based in Michigan that seeks to promote the right of all children to have safe, permanent families. Its director is Marci R. Feinberg. Many attorneys and psychologists comprise HMV's Board of Directors or National Advisory Council. HMV's interest in this petition arises from its concern that attorneys and psychologists are being deterred from child advocacy activity.

5. **Justice for Children** ("JFC") is a national child advocacy organization with eleven chapters in nine states. JFC's president is attorney Randall Burton of Houston, Texas. JFC's concern in this case is that the speech of all child advocates, especially attorneys, will be chilled if the Oklahoma decision below is allowed to stand.

6. **The LINKUP, Survivors of Clergy Sexual Abuse, Inc.**, based in Illinois, with over 5,000 members, assists victims and promotes institutional prevention efforts. Its president is Thomas H. Economus. LINKUP has an interest in seeing that victims have a voice in the legal process.

7. **The National Alliance for Family Court Justice**, based in Virginia, is an organization directed to lobbying for abused children and legislative reform of court practices that are gender-biased or that adversely impact children. The national director of the Alliance is Elizabeth Richards. The Alliance's interest in this Court's grant of certiorari is that political speech on behalf of children, not be stifled.

8. **The National Committee for the Rights of the Child** is a coalition of other child advocacy organizations dedicated to establishing that children are "persons" under the U.S. Constitution. Its president is Ted Steege. NCRC includes many attorney participants and supports the petition due to its advocacy for constitutional protections for the voice of children in legal proceedings that affect them.

9. **The National Task Force for Children's Constitutional Rights, Inc.** is a multi-disciplinary organization founded by Connecticut Superior Court Judge Charles D. Gill and Dr. Anne Burgess in 1988. With membership in fifty states, the Task Force has appeared as amicus curiae in appeals in state and federal courts where the constitutional rights and interests of children are at stake. The Task Force has an interest in more fully demonstrating to this Court the need for granting review in this case to decide issues of compelling public importance involving the constitutional rights of those who advocate on behalf of children in the legal system.

10. **One Voice/ACAA("One Voice")**, based in Washington, D.C., is a national advocacy organization for abused children and adult child abuse survivors. The American Coalition for Abuse Awareness ("ACAA") is the public policy project of One Voice. The president of One Voice/ACAA is attorney Sherry Quirk. One Voice has an interest in this case based on its belief that open discussion of victim and children's issues will be thwarted when attorneys and therapists fear that their participation in honest dialogue will result in professional censure.

11. **Hal Pipinsky, J.D. and Ph.D., Professor of Criminology**, University of Indiana, has a professional interest in the rights of abused children and their non-offending caregivers and has served as an expert witness in child abuse cases. His interest in the petition is due to his concern that the voices of child advocates not be silenced.

12. **The Ross County Network for the Prevention of Child Sexual Abuse ("The Network")** is a 501(c)(3) Ohio-based child advocacy

organization which includes attorney board members. Its director is Portia Davis. The Network's interest in the petition is based on its concern that child advocates, particularly attorneys, are discouraged from speaking freely on behalf of child safety.

13. **Survivors and Victims Empowered** ("SAVE"), based in Pennsylvania, is a 501(c)(3) advocacy organization. Its director is L. Philip Sheldon Jr. SAVE has an interest in the safety not only of victims but of the right of others to advocate for them.

14. **Survivors' Network of those Abused by Priests** ("SNAP"), based in Illinois, is an organization whose goal is to assist survivors of clergy sexual abuse. SNAP's national director is David Clohessy. With support groups in eleven states, SNAP has an interest in promoting a freer public dialogue about the concerns of sexual abuse victims.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This brief is submitted in accordance with U.S. Supreme Court Rule 37, a consent letter from the petitioner's counsel of record being filed herewith, and a copy of the respondent's consent letter also being filed herewith, the original of which is being sent by the respondent to the U.S. Supreme Court Clerk under separate cover. The Amici, many of whom have attorney members and spokespersons, are concerned that those attorneys, as a result of the Oklahoma decision below, may now be subjected to discriminatory professional discipline and loss of licensing due to the application of broad, general, and vague regulations such as Oklahoma's Rule 8.4(d). Seven years ago this Court was called upon to place constitutional restrictions on a State's power to ban the public speech of criminal defense attorneys in *Gentile v. Nevada State Bar*, 501 U.S. 1030 (1991). Still unaddressed, and a matter of grave public importance, are the First Amendment restrictions that must be imposed on a State's ability to ban the unpopular but good faith speech of an attorney motivated solely by concern for child safety.

Attorneys and other professionals who advocate for children at a time of great political hostility to their efforts, are increasingly targeted for professional discipline, with widely varying results. Such professionals deserve to know that the First Amendment will protect

them at least as well as it does their right to engage in commercial speech. A citizen who has reason to believe she must report systemic child abuse, should not have to fear that her reliance on statutory immunity for such report is meaningless. The Oklahoma decision below leaves such assumptions open to question, resulting in the chilling of a broad variety of speech.

Hine v. Oklahoma Bar Association offers this Court the opportunity to clear up the confusion created by the Oklahoma Supreme Court decision below, to reassert the individual's First Amendment freedom to interpret "justice" in more than one officially sanctioned manner, and to reassure citizens that their political expressions will not have to be paid for by censure in their professional lives.

THE ARGUMENT

I. This Court Should Accept Certiorari to Rectify the Oklahoma Decision Below Refusing to Protect Petitioner Hine's Speech Under the First Amendment, so as to Resolve and Clarify Serious Questions of Public Importance as to the Circumstances under which Lawyer Speech can Reliably Enjoy Constitutional Protection[1].

A. *General disciplinary regulations prohibiting conduct that prejudices the State's then current concept of justice, require this Court's intervention and the setting of uniform constitutional guidelines.*

This Court has long observed the prejudice to the interests of justice that occurs when trial courts confuse "offenses to their sensibilities with obstruction to the administration of justice". *In re Little*, 404 U.S. 553, 555 (1972) (quoting *Brown v. United States*, 356 U.S. 148, 153 (1958)). Although

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[1] The within brief was not prepared by counsel for any party, but the petitioner participated in its preparation and covered the cost of printing.

> "the fair administration of justice requires that lawyers challenge a judge's purported impartiality when facts arise which suggest the judge has exhibited bias or prejudice"[2],

judicial sensibilities may understandably continue to be arguable topics of concern when a judge's impartiality or even his integrity is challenged. Such concerns have nonetheless been held not to justify lawyer criticism. E. g. *In re Sawyer*, 360 U.S. 622 (1959); *In re Snyder*, 472 U.S. 634 (1985).

What is not so understandable is that concern about judicial sensibilities has now been extended so that criticism of the conduct of *witnesses or others* is considered "prejudicial to the administration of justice" where the trial judge or the participating attorneys become sufficiently upset about the criticism.[3] The Amici submit that protecting not only First Amendment rights of attorney speakers but the interests of justice flowing from those rights, is difficult enough when the speech is critical of the judiciary. Courts have had problems with the breadth and generality of regulations such as Rule 8.4(d) for well over a century.[4] Such problems may be brushed aside where the offending conduct "has nothing to do with conscientious, but unpopular, opinions or ex post facto definitions of unethical behavior."[5] But the decision of the Oklahoma Supreme Court below has everything to do with conscientious but unpopular speech and must no longer be allowed to stand as precedent.

A growing body of citizens of every state now speak publicly about political issues or associate in organizations in which others, often lawyers, do so on their behalf. Aside from the massive and seemingly enduring public interest in children's issues, special

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[2] *United States v. Cooper*, 872 F2d 1, 3 (1st Cir. 1989)

[3] Judge Lee's testimony at p. 4e of the petitioner's Appendix speaks to the degree of "upset" that the judge and both attorneys experienced, evidently due to the SCAN letter's criticism of two local agencies.

[4] E.g. *Parker v. Levy*, 417 U .S. 733, 756 (1974); *Ex Parte Secombe*, 60 U.S. (19 How.) 9, 14 (1857)

[5] *In Re Gillard*, 271 N.W.2d 785, 809 (Minn. 1978)

interest groups, self-help groups, religious/political organizations and other groups wishing to make a difference in public policy, if only at the local level, are proliferating at a healthy rate[6].

The Oklahoma decision below casts doubt on such decisions as *Squire v. Pace*, 516 F2d 240 (1975), cert den. 423 U.S. 840 and *People v. Klick*, 66 Ill.2d 269, 362 N.E.2d 329(1977) where the First Amendment prohibited arbitrary prosecution of those who "annoy" others. It is no longer such a great leap for citizens to wonder whether disorderly conduct statutes or obstruction of justice regulations will again be imposed to suppress expressions of political opinion. After all, arguments may even be made that American citizenship itself, like the status of being a lawyer, is a privilege that carries responsibilities, one of which may include the foregoing of government criticism, if believed to be intemperate.

B. *Even under reduced constitutional standards, lawyer commercial speech has enjoyed greater constitutional protection than that afforded to petitioner Hine. The Oklahoma decision, if permitted to stand, ludicrously suggests that political speech is less constitutionally protected than is commercial speech.*

Although First Amendment protections have always been limited in the area of commercial speech, they are not insubstantial.[7] When state professional licensing boards have sought to ban certain commercial practices of members, this Court has often been skeptical of the State's claimed justifications, stating that even purely

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[6] E.g. Frances Moore Lappe and Paul Martin DuBois in *The Quickening of America* [Jossey-Bass Inc., San Francisco, 1994] describe and offer assistance to what Henry Cisneros, Secretary of HUD refers to as "a new practice of democracy as *citizen problem-solving* - in our schools, communities, and workplaces". *Quickening* lists over a hundred grassroots organizations, many of which, like the Center for Community Change, the Maverick Institute, and the National Issues Forum, exist exclusively to teach other organizations how to promote public dialogue and participatory democracy.

[7] Even a trial lawyers' boycott aimed solely at forcing the government to increase attorney compensation was protected under the First Amendment in *Superior Court Trial Lawyers Asso. v. FTC*, 875 F2d 226 (App.D.C., 1988)

commercial advertising "serves individual and societal interests in assuring informed and reliable decisionmaking".[8] Citing *Kleindienst v. Mandel*, 408 U.S. 753, 762-763 (1972), this Court particularly emphasized that the First Amendment protects the public's reciprocal right to receive the commercial information the speaker has the right to express. [*Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748, 757 (1976)]

In *Bates v. State Bar of Arizona*, 433 U.S. 350, 375 (1977) this Court observed that there were other perspectives on the meaning of justice than those of the organized bar, and rejected the Arizona Bar's argument that lawyer advertising would improperly stir up litigation. The *Bates* Court reasoned further that the expectation of advertising-driven increases in accessibility of legal services to previously underserved portions of the population strengthened the disciplined attorneys' First Amendment argument because the resultant stimulus to "collective activity undertaken to obtain meaningful access to the courts"[9] was a matter deserving of significant constitutional protection. Petitioner's SCAN letter not only encouraged First Amendment protected petitioning activity but itself constituted collective petitioning activity lying at the core of the First Amendment, a fact completely ignored by the Oklahoma court below.

At a time when information is exploding about child abuse and its many subtopics, often spanning several disciplines, legislation is being called for to require judges to learn more about many of the same topics contained in the SCAN letter.[10] Mandatory judicial

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[8] *Bates v. State Bar of Arizona*, 433 U.S. 350, 364 (1977). One would think that judges are included in the category of persons who not only can benefit from a free exchange of ideas and information, but who also do not need to be insulated from hearing unpleasant information when unsophisticated consumers need no such "protection".

[9] *Bates* at p. 376, footnote 32 of the opinion.

[10] State of the art information about such topics as children's susceptibility to coercion, and family reunification, is constantly changing. Keeping abreast of the most accurate information available, or at least knowing enough to be able to properly evaluate the expert witnesses is crucial for any judge who is addressing litigation involving abuse allegations.

training is being legislated, primarily due to a wave of public sentiment expressed to Congress and state legislatures calling for increased training in the new information.[11]

Since *Virginia Pharmacy Board* and *Bates*, this Court has set out with more specificity, the elements of the intermediate scrutiny framework for assessing restrictions on purely commercial speech. Even to regulate commercial speech, the State must prove that the regulation is narrowly drawn and materially advances the State's stated interest.[12] Rule 8.4(d), however, is anything but narrowly drawn, apart from whether it is void for vagueness. Even had the SCAN letter been sent for pecuniary motives, which it clearly was not,[13] the limited protections of the *Central Hudson* test would have still precluded the Oklahoma Bar Association from banning the letter.

The Amici believe that this Court has a fundamental concern, expressed in its later lawyer commercial speech cases, that lawyers temper their "selfish pursuit of economic success by adhering to

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[11] Following the 1995 murder of two year old Ryan Luke, after he had been judicially identified as at risk, Oklahoma enacted 10 Ok. St. Sec. 1211, requiring judicial training in child abuse and neglect. The August 6, 1992 testimony of attorney Joan Pennington to the Judicial Committee of the U.S. House of Representatives described the then urgent need for training, noting that judges do not grasp the extent of child sexual abuse, tend to villify parents who believe their children's disclosures about child sexual abuse, and deny meaningful opportunities to present evidence in support of the child's allegations. Some concerns about lack of judicial training are being addressed by such curricula as the one created in late 1996 as a joint project of the NOW Legal Defense and Education Fund in cooperation with the National Association of Women Judges and the American Bar Association Center on Children and the Law, entitled "Adjudicating Allegations of Child Sexual Abuse When Custody is in Dispute". At the trial court level, often in rural counties, however, practices such as Judge Lee's failure in the Perry case to appoint an attorney, guardian *ad litem*, or CASA for the allegedly abused child, though required under federal statute[42 U.S.C. Sec. 5106a(b)(2)(A)(ix)], are all too common.

[12] *Central Hudson Gas & Electric Corp. v. Public Service Comm'n of N.Y.*, 447 U.S. 557, 564-565 (1980)

[13] See p. 8a of Ok. Sup. Ct. decision below, App. A, pet./cert.

[higher] standards of conduct".[14] In her dissenting opinion in *Shapero*, Justice O'Connor focused on the Court's two major concerns in looking at why lawyers are regulated at all, and noted the twin evils of (1)overzealous representation of a client, and (2)abuse of the client for the lawyer's benefit.[15] Neither is a concern with this petitioner. Out of concern for the many opportunities for misconduct, members of this Court have urged lawyers to aspire to the goal of voluntary public service, "a goal that transcends the accumulation of wealth."[16] Broad and unclear *bans* on voluntary public service such as those imposed below, hardly promote any legitimate goals for the profession or the administration of justice.

C. *Where a citizen has reasons to expect that her conduct is protected not only by the First Amendment but also by child abuse reporting statutes, the punishment of such citizen's speech chills the speech of all other citizens.*

One measure of safety a lawyer can perceive she has in a profession in which broad, general regulations such as 8.4(d) are in effect, occurs when statutes are in place that promise immunity. Nonetheless there has always been an uneasiness among citizens about reporting child abuse.[17] This uneasiness goes back to the time

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[14] *Shapero v. Kentucky Bar Assn.*, 486 U.S. 466, 488 (1988).

[15] *Shapero* Id. at p. 489

[16] *Shapero* Id., at p. 489.

[17] It is well accepted that the

> "voluntary reporting of suspected cases to community authorities has been inhibited by many factors. . . Neighbors and friends hesitate to make accusations. An abusive father or mother, facile with explanations, often escapes discovery. . . Some physicians have regarded reporting as a breach of the special confidential relationship between physician and patient, and still others have failed to report either because they did not know to whom to report, or because they had no reason to believe that reporting would result in benefit to the child." Paulsen, M. "The Legal Framework for Child Protection", 66 Columbia L. Rev. 679, 710 (1966)

of Freud and even earlier[18], and has persisted at least until the time of professional recognition of the Battered Child Syndrome in 1962.[19]

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[18] Masson and others have told the story of Freud's turn of the century recognition of the prevalence of childhood sexual abuse in his patients and his subsequent abrupt change of attitude. Masson, J. *The Assault on Truth: Freud's Suppression of the Seduction Theory.* Farrar, Strauss, & Giroux, Hew York , 1984. Herman, J. *Father-daughter Incest* . Harvard University Press, Cambridge & London, 1981. Summit, R. "Hidden Victims, Hidden Pain: Society's Avoidance of Child Sexual Abuse." In G.D. Wyatt & G.J. Powell (Eds), *Lasting Effects of Child Sexual Abuse.* (pp. 39-60). Sage Publications, Newbury Park, CA. 1988. When he announced his "childhood seduction" theory to the psychoanalytic establishment of Vienna, Freud's psychoanalytic colleagues threatened to destroy him professionally. [Masson (1984)]Freud then aligned his thinking to conform to that of his colleagues, transforming his "childhood seduction" theory into one in which the responsibility for incestuous longings would fall squarely on the shoulders of the child, and in which actual adult-child sexual interaction became merely a childish fantasy. Ferenczi, one of Freud's students, insisted that the original theory was correct and based his lifework on that assumption. E.g. Ferenczi, S. "Confusion of Tongues Between Adults and the Child: the Language of Tenderness and Passion". In M. Balint (Ed.) *Final Contributions to the Problems and Methods of Psycho-analysis* (pp. 156-167), Hogarth Press, London (1955). Freud joined his colleagues in casting aspersions not only on Ferenczi's professionalism, but his sanity. (Masson, 1984, p. 152). Dr. Karel Pyck, Chair of the Department of Child and Adolescent Psychiatry, University of Leuven, Belgium, reports that forensic writings concerning child sexual abuse date back to the 1550's and 1560's in France, but that cycles of professional retaliation have repressed such information for centuries. ARCH (Alliance for the Rights of Children) Newsletter, Summer, 1993, p. 5.

[19] Professional silence about child abuse was dramatically shattered with the publishing of "The Battered-Child Syndrome". [Kempe, Steele, Silverman, Silver and Droegemueller, JAMA, July 7, 1962] Previous work by other physicians had raised the issue of there being a curious link between multiple fractures of the long bones and chronic bleeding under the skull, which in turn lead to much speculation about how leg fractures could be a complication of subdural hemorrhaging. Few had dared to look to traumatic causation. [*See* Siegel, B., pp. 202-212, *A Deat' in White Bear Lake*, Bantam Books, 1991, New York] Kempe and his colleagues did dare to draw the obvious conclusions, noting in the article that

By the late 1960's virtually every state had enacted legislation *requiring* physicians to report child abuse, generally with criminal sanctions for failing to report merely suspected abuse.[20]

However, the early child protection agencies were then, and are said to be now, "patchwork systems of blurred responsibility, often based on vague and superficial considerations".[21] In recognition of the growing problem of children suffering further injury and even death after having been identified by a child protection agency,[22] Congress passed the Child Abuse Prevention and Treatment Act in 1974.[23] Section 4(b)(2) of the Act provided, in part, that as a condition for receiving federal assistance each State would be required to enact legislation mandating immunity for reporters.

It is important to note that the federal act originally standardized the definition of "child abuse and neglect" to be

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> "[t]he battered-child syndrome is a term used by us to characterize a clinical condition in young children who have received serious physical abuse, generally from a parent or foster parent . . . It is a significant cause of childhood disability and death. Unfortunately, it is frequently not recognized or, if diagnosed, is inadequately handled by the physician because of *hesitation to bring the case to the attention of the proper authorities.*" [Emphasis supplied]

[20]Besharov, D. "The Legal Aspects of Reporting Known and Suspected Child Abuse and Neglect", 23 Villanova L. Rev. 445, 465-466 (1978)

[21] Besharov, D. Id. at p. 459; Judge Charles Gill likewise noted that in his home state of Connecticut "[i]t is conceded that sixty percent of such calls [regarding child abuse] are not afforded any response" and "[n]ot only are child abuse and neglect wrong, but the nation's lack of an effective response to them is also wrong. Neither can be tolerated. Together they constitute *a moral disaster.*"[Gill. C. "Essay on the Status of the American Child, 2000 A.D.: Chattel or Constitutionally Protected Child-Citizen?", 17 Ohio Northern L. Rev. 543, 552, 555 (1991)]

[22] Several empirical studies reveal that between 30% and 50% of children dying from abuse were already known by the Child Protection System to be at risk. *See* Berliner, L. and Gelles, R. "Is Family Preservation in the Best Interest of Children?" 8 J. Interpersonal Violence 556, 560 (Dec. 1993).

[23] 42 U.S.C. Sec. 5101-5106

> "the physical or mental injury, sexual abuse, negligent treatment, or maltreatment of a child under the age of eighteen *by a person who is responsible for the child's welfare* under circumstances which indicate that the child's health or welfare is harmed or threatened thereby."[24]

Under this definition, given the testimony of the Perry child's therapist, Linda Palmer, [Pet. Cert. App. E] and others given at petitioner's trial, the conduct of the county agencies involved in investigating the Perry child's alleged abuse and implementing the supervised visitation order, unequivocally appears to meet the federally standardized definition of abuse or neglect.[25] The fact that the abuse or neglect of the Perry child was at the hands of the government agencies did not "exempt or prohibit" petitioner Hine from reporting in good faith to Judge Lee.[26]

Petitioner had every reason to believe her act of reporting the suspected mistreatment of the child *within the child protection system* was not only permitted, but mandated by state law.[27]

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[24] 42 U.S.C. Sec 5106g(4).

[25] The Committee on Labor and Human Resources reported in July, 1995 that "child protective systems (CPS) are routinely placing children in jeopardy" and quoted the U.S. Advisory Board's 1990 report entitled "Critical First Steps in Response to a National Emergency" as stating in reference to the CPS that 'the safety of children cannot be ensured. Indeed, the system itself can at times be abusive to children'. Report No. 104-117 to Accompany S. 919, 104th Congress, 1st Session, Calendar No. 149, legislative day, July 10, 1995, pp. 2-3.

[26] *See* 10 Ok. St. Sec. 846(G). 10 Ok. St. Sec. 7105 seemed to provide Hine and others with

> "immunity from any liability, civil or criminal, that might otherwise be incurred or imposed. Any *such participant shall have the same immunity with respect to participation in any judicial proceeding* resulting from such report." [Emphasis supplied]

[27] 10 Ok. St. Sec. 846(A)(1)(d) renders all "other person[s]", i.e. persons other than physicians, nurses, and teachers named in Sec. 846(A)(1)(a)-(c), mandated reporters.

If the Oklahoma decision below continues to stand, it can be anticipated that citizens who suspect child abuse perpetrated by an individual or an institution, will again fear retribution for reporting.[28]

II. This Court Should Accept Certiorari in Consideration of the Hostile Political Climate in which Petitioner's Speech was Subjected to Punishment, the Probability that Oklahoma's Rule 8.4(d) was Applied to her Speech in a Discriminatory Manner, and the Compelling Public Importance of this Court's Setting Clear Constitutional Standards for Such Regulations that Continue to Stifle Public Discourse about Controversial or Unpopular Topics.

A. *Control of the media by the anti-child protection backlash has unduly influenced the legal profession.*

It is common and usual for any reform movement, after it achieves a certain measure of public support and sympathy, to be subjected to an opposition movement, which will be referred to in the context of the child protection movement,' as "the Backlash".[29] Backlash movements generally, as is true of the anti-child protection movement, present themselves as not being opposed to the publicly accepted goals of the reform movement. After all, it is difficult

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[28] Fear and the consequent chilling effect that it produces upon speech need not be rational to be effective at silencing child abuse reports.

> "Fear of being sued unjustly for libel, slander, defamation, invasion of privacy, and breach of confidentiality is frequently cited as a deterrent to more complete reporting. [Citations omitted] This fear exists even though applying existing legal doctrines leads to the conclusion that anyone making a legally mandated or authorized report would be free from liability so long as the report was made in good faith. 'The point is that the common law and all of our decisional authority already confers such immunity, and *there is no American case that even suggests that there may be liability for a good faith report of the kind required by battered child statutes*.'"
> [Besharov, D. at p. 475. (Ftnt. 20 *Supra)*]

[29] Myers, J. (Ed.) *The Backlash.* Sage Publications, Thousand Oaks, 1994.

politically to publicly oppose the concept of child protection. The posture of the Backlash movement is that it is not the "goals" of the reform movement that are opposed, only its "methods". [30]

And so it has been with child protection. With the fanfare that accompanied Kempe's Battered Child Syndrome and then Roland Summit's Child Sexual Abuse Accommodation Syndrome[31], the public, the news media, and even the legal system, seemed by the mid-eighties to be prepared to receive and process increasing numbers of newly mandated disclosures of child abuse. Funds became available, to a certain extent, for studies of the issues, though in amounts inadequate to deal with the annually geometrically increasing wave of child abuse reports.[32]

While the child protection system of the 1980's was ill-equipped to fulfill its mandate,[33] by 1991 more than 80 percent of news coverage about child sexual abuse was weighted toward stories of survivors and the nature of childhood trauma.[34] By 1994,

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[30] Conte, J. "Child Sexual Abuse: Awareness and Backlash", pp. 224-233, Vol. 4, The Future of Children, Summer/Fall, 1994.

[31] Summit, R. "The Child Sexual Abuse Accommodation Syndrome", 9 Child Abuse & Neglect, pp. 177-193 (1983)

[32] Reports of children suspected of being abused or neglected increased twenty-fold from 1963 to 1993, from approximately 150,000 to 3 million. See Report 104-117 from Note 23 *supra*, at p. 13.

[33] Major cuts in social service funds in the 1980's left few resources for personnel and training opportunities needed for effective prosecution, other than though a few such enactments as the Children's Justice Act of 1986 and NCCAN. *Joint Investigations of Child Abuse: Report of a Symposium*, U.S. Dept./Justice Office of Justice Programs, July, 1993. Alice Vacchs' *Sex Crimes*, Owl Books, New York, 1994; reported at p. xi that the United States Judiciary Committee's "Violence Against Women: The Response to Rape: Detours on the Road to Equal Justice", based on 1990 statistics, found that 98% of rape victims never saw their attacker caught, tried and imprisoned. It is estimated that some 61% of rape victims are children. National Victim Center and the Crime Victims Research and Treatment Center, *Rape in America. A Report to the Nation*, April 23, 1992, pp. 1-16.

[34] University of Michigan sociologist Katherine Beckett's 1996 study of media portrayals of child sexual abuse in four national magazines [Time, People,

following the 1992 organization in Philadelphia of a support group for parents accused of sexually abusing their children[35], more than 80 percent of news coverage in the same publications focused on false accusations and the newly coined concept of "false memory".[36]

Despite the continuing escalation of child abuse reports in all states, the sophisticated strategies of the False Memory Syndrome Foundation began to have a substantial impact on media portrayals of child abuse, particularly child sexual abuse. There are said to be at least 247 articles about the FMSF or its founders, in such national newspapers and magazines as USA Today, The Washington Post, The Baltimore Sun, The Chicago Tribune, The Los Angeles Times, The Dallas Morning News, Newsweek, Time Magazine, and Psychology Today.[37] Television programs sympathetic to the Backlash and to

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Newsweek, and U.S. News & World Reports] is described in Mike Stanton's "U-Turn on Memory Lane"; Columbia Journalism Review, pp. 44-49, July/August, 1997.

[35] Id. Pamela and Peter Freyd, privately accused of child sexual abuse by their adult daughter, Dr. Jennifer Freyd, in 1990, formed the False Memory Syndrome Foundation ("FMSF") as part of a public campaign ostensibly challenging the validity of recovered memories of sexual abuse which had been suppressed in a form of "traumatic amnesia" .

[36] *See* ftnts 34 and 35 *supra.*

[37] The FMSF is the primary Backlash organization, but other groups have preceded or spun off from it, including VOCAL (Victims Of Child Abuse Legislation), and the Children's Rights Council. Although not formally affiliated with the FMSF, such organizations as NAMBLA (North American Man Boy Love Association) and a Newsletter entitled "Uncommon Desires" [published by New York attorney Lawrence Stanley according to New York Daily News Staff Writer Gene Mustain], openly espouse the de-criminalization of sex between adults and children. Prominent FMSF spokesman Ralph Underwager has publicly endorsed the professionalism of the NAMBLA publication Paidika. He was quoted in that publication as agreeing that pedophilia was "a responsible choice for the individual". Paidika: The Journal of Pedophilia, pp. 2-12, 3 Vol. 3, Winter (1993). FMSF Board member Hollida Wakefield was quoted at p. 12 of the same article: "It would be nice if someone could get some kind of big research grant to do a longitudinal study of, let's say, a hundred twelve-year-old boys in relationships with loving paedophiles."

those referring to themselves as falsely accused, have appeared regularly on such national news programs as Turning Point[38], Frontline, Good Morning America, and National Public Radio.[39]

The rising influence of the Backlash in the popular media has been paralleled in seminars and other continuing legal education materials, including several in Oklahoma.[40] Not surprisingly, this country began to see increasing numbers of decisions in which the

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[38] ABC's Turning Point has produced several documentaries, the latest of which ["When Children Accuse: Who to Believe?] broadcast on July 24, 1997, took the position that many prosecutions resulting in convictions for child sexual abuse, are based on evidence manufactured by over-zealous therapists and prosecutors. Convicted defendants were portrayed as the true victims. The Turning Point series of programs include in-depth interviews of alleged victims only if they had recanted, a not unusual phenomenon for bona fide victims of parental abuse.

[39] *Freyd v. Whitfield*, D.C. Md., No. L-96-627 Memorandum opinion of Judge Benson Everett Legg entered July 18, 1997, at p. 2.

[40] FMSF spokespersons Underwager and Wakefield presented a "Child Abuse Sex Crimes Seminar" in Oklahoma City, Ok. October 26, 27, and 28, 1995, attendance at which entitled Oklahoma attorneys to continuing legal education credit from the Oklahoma Bar Association. Underwager's 1995 Vita claimed presentations to at least twelve attorney associations between 1987 and 1995 in the states of Minnesota, Florida, Iowa, Mississippi, Wisconsin, Kentucky, North Dakota, New York, Tennessee, North Carolina, Indiana, and Nebraska, as well as in Australia, apart from numerous presentations to media, law enforcement, and legislative bodies.

By the mid-1990's Oklahoma's Family Law Journal, a publication of the Oklahoma Bar Association's Family Law Section, when it contained articles concerning child sexual abuse, included primarily articles slanted toward the Backlash. E.g. Call, J. "False Allegations of Sexual Abuse in Custody and Visitation Disputes", 9 Ok. Fam. L. J. 76 (Nov. 1994); Adams, J. "Child Abuse Reporting Laws: Recent Controversies", 10 Ok. Fam. L. J. 61 (June, 1995). As in other states, Oklahoma decisions by the mid 1990's at all levels began to reflect a willingness to award custody to those accused of child sexual abuse. E.g. *Kahree v. Kahree*, 66 O.B.J. 3771 (Ok. 1995); *Matter of R.L.S.*, 65 O.B.J. 2829 (Ok. App. 1994)

validity of children's accusations of sexual abuse was discounted.[41] Part of the rationale of many of such decisions included the characterization of children's therapists as unethical.[42] Although not targeted to anywhere near the extent of children's therapists, attorneys associated with child protection have increasingly come to be subjected to defamation suits, Rule 11 sanctions, and bar disciplinary proceedings, as has been petitioner Hine.[43]

B. *The political climate created by the Backlash and its extraordinary efforts to silence its critics must be fully considered in assessing the potential for discriminatory applications of Rule 8.4(d)*

When this Court last considered the issue of First Amendment protection for attorneys charged under imprecise disciplinary regulations such as Oklahoma's 8.4(d), Justice Kennedy's opinion paid particular attention to the potential dangers of discriminatory enforcement.[44] In *Gentile* the inquiry was of particular relevance because of the unusual susceptibility of the criminal defense bar, due to its constant position of criticizing government. Attorney Hine is likewise a member of a group, consisting of professionals who advocate vigorously for children, that is demonstrably susceptible to such potential discrimination.

The Backlash has been remarkably successful in its strategies of shifting the focus from child victims to the allegedly falsely

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[41] E.g. *Morgan v. Foretich*, 846 F2d 941 (4th Cir. 1988) and cases described in Summit, R. "Too Terrible to Hear", March 13, 1987 revision of paper in support of testimony before the U.S. Attorney General's Commission on Pornography, Miami, FL., November 20, 1985, available through Harbor-UCLA Med. Ctr., D-6, 1000 W. Carson, Torrance, CA. 90509; and in Rotondo, S. "Who's Protecting Whom?", (pp. 6-9)Body Memories, Berkeley, CA. Spring, 1995

[42] E.g. *Kahree v. Kahree*, at ftnt 38 *supra; See also Sullivan v. Cheshier*, 846 F.Supp. 654 (N.D. Ill. 1994); *Ramona v. Isabella*, No. 61898 (Cal. Super. Ct. May 13, 1994)

[43] See ftnts. 45-48 *infra*.

[44] *Gentile v. State Bar of Nevada*, 501 U. S. 1030, 1051 (1991)

accused, as well as in its primary objective of influencing media coverage.[45] Successful FMSF techniques also include congressional lobbying, public lectures, scientific conferences, on-line discussion groups, a newsletter, an 800 number, the picketing of therapists' homes[46], defamation suits[47], and grievances against troublesome attorneys.[48]

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[45] Stanton article, at ftnt. 31 *supra*, p. 47 quoting Katherine Beckett.

[46] Freyd v. Whitfield, Id. at p. 2

[47] Aside from the defamation suit against trauma expert Whitfield, a series of suits have been filed against HBO, Inc. and others, including an attorney commentator, due to a documentary critical of the role of the Houston judiciary in child sexual abuse cases [Huckabee v. HBO, Inc., No. 93-00116, Harrison v. HBO, Inc., No. 93-052010, and Hebert v. Grant, No. 93-041705, 127th Jud. Dist. Ct./Harris County, Texas; the first two suits are now on appeal in Ct./App. 14th Jud. Dist, Houston, Tx., as Case Nos. 14-96-01528-CV and 14-96-01529-CV, respectively] Lawsuits and picketing of therapist and newsletter editor David Calof caused serious interruption of the publication of Treating Abuse Today. The problem of rising numbers of suits against therapists who hear the disclosures of adult survivors, in which increasingly novel theories are used in support, are described in Bowman, C.. and Mertz, E. "A Dangerous Direction: Legal Intervention in Sexual Abuse Survivor Therapy", 109 Harvard L. Rev. 549, Jan. 1996.

FMSF psychologists Ralph Underwager and Hollida Wakefield sued psychologist and researcher Dr. Anna Salter and ten other entities, including the National Center for Prosecution of Child Abuse and several attorneys, for defamation in ***Underwager v. Salter***, 22 F3d 730 (7th Cir.1994). The Court of Appeals affirmed the grant of summary judgment to the defendants, ruling that Underwager and Wakefield would not be allowed to

> "silence those who hold divergent views, no matter how adverse those views may be to plaintiffs' interests. Scientific controversies must be settled by the methods of science rather than by the methods of litigation." (P. 736 of opinion)

[48] Joan Pennington Id. reported to Congress concerning the disbarment of Garnett Harrison in Mississippi because a mother she was representing was incarcerated until she revealed the names of those who had helped her hide her children. In divulging this information she implicated her attorney. Harrison denied knowing the children's location. *Newsome v. Newsome*, 557 So.2d 511 (1987). Pennington also testified concerning attorney Alan Rosenfield, an attorney and child advocate in New Hampshire, whose license

Such tactics, taken as a whole, are reminiscent of earlier periods in the history of this Court's championing of First Amendment rights. It was certainly not in a vacuum that Dirk DeJonge was prosecuted for speaking at a Communist Party meeting in protest of local jail conditions. *DeJonge v. State of Oregon*, 299 U.S. 255 (1937). This Court, though not specifically speaking to discriminatory enforcement, clearly considered the volatility of the often overzealous anti-Communist sentiment prevalent in this country when it enforced the First Amendment not only in *Delonge* but again when protecting the speech of an attorney so frustrated with the elusive process of defending persons charged under the Smith Act that she publicly questioned the integrity of the trial process. *In re Sawyer*, 360 U.S. 622 (1959). This Court again considered the political context of attempts to discipline NAACP lawyers in the 1960's and permitted those lawyers the protections of the First Amendment.[49]

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was suspended due to advice he gave a client about a judge's contemplated reaction in the event she ran to protect her abused child.

In a recent case very similar to petitioner's, Woody Allen, whose sexual abuse defense was conducted in large part by the FMSF, brought a grievance against prosecutor Frank Maco, due to press conferences and a faxed letter sent to judges presiding over the Mia Farrow/Woody Allen custody/visitation proceedings. On July 17, 1997, following several years of disciplinary proceedings in which prosecutor Maco, like petitioner Hine, had been charged with violations of Rule 8.4(d) [conduct prejudicial to the administration of justice], a Connecticut Statewide Grievance Committee voted twelve to one to dismiss the complaint. *Allen v. Maco*, Grievance Complaint No. 93-0322. Paralleling the testimony of Dianna Carroll in the case at bar, [App. E, pet/cert, p. 11e] Joan Pennington's Congressional testimony observed that Backlash lawsuits against professionals

> "rarely win, however it is still costly to defend a court action even when you are innocent. In addition, this type of strategy has a chilling effect on all of those who would like to help the protective parent, but are afraid of the of expense of defending in a civil lawsuit."

[49] E.g. *NAACP v. Button*, 371 U.S. 415 (1963).

A full consideration of the hostility of the political climate toward child advocates will lead this Court to conclude that the vagueness and overbreadth of Rule 8.4(d) nourished the potential, if not the actuality, of discriminatory application of the rule to the petitioner so as to silence voices seeking to speak for children in a way that has become unpopular with the Backlash influenced orthodoxy.

III. CONCLUSION

When a lawyer is punished for speaking as a citizen about timely political topics of grave public interest and concern, and a State court of highest resort does not even acknowledge that the First Amendment is involved, it is incumbent upon this Court to review the limits on a State's power to apply broad, general regulations that stifle unpopular political speech. The Amici join in requesting this Court to review the decision of the Oklahoma Supreme Court below.

Respectfully submitted,
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